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No. 92-1299

In the Supreme Court of the United States

OCTOBER TERM, 1992

AGUSTIN RHOA-ZAMORA, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the filing of a motion to reopen before the Board of Immigration Appeals renders the challenged decision nonfinal and thus deprives the courts of appeals of jurisdiction to entertain a petition for review of that decision.

2. Whether the Board of Immigration Appeals deprives a litigant of due process if it takes official notice of facts relevant to a matter before it without first giving the litigant prior notice, even if it grants the litigant an opportunity to rebut the noticed facts by means of a motion to reopen.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A24) is reported at 971 F.2d 26. The decisions of the Board of Immigration Appeals (Pet. App. A25-A29) and the immigration judge (Pet. App. A30-A44) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 1992. The court of appeals denied a petition for rehearing on November 4, 1992. The petition for a writ of certiorari was filed on February 2, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a Nicaraguan citizen who entered the United States without inspection near Brownsville, Texas, on December 24, 1986. The Immigration and Naturalization Service (INS) apprehended him on December 25, 1986, and initiated deportation proceedings. Pet. App. A3, A26, A30-A31.

2. At his deportation hearing, petitioner conceded that he was deportable and applied for asylum and withholding of deportation. Pet. App. A31-A32. In support of that application, petitioner testified that he had been active in the Charismatic Catholic movement in Nicaragua and had associated publicly with a priest the Sandinistas had treated as a counterrevolutionary. He also testified that on one occasion a mob of people celebrated a mock mass outside his home, during which they hung and burnt an effigy of the priest and threatened similar treatment for sympathizers of the Contra movement (which was opposed to the Sandinistas). *Id.* at A35-A36; AR 589-595.[1] Petitioner argued that he had left Nicaragua because he feared persecution as a result of those events.

The immigration judge denied petitioner's applications for asylum and withholding of deportation. Pet. App. A30-A44. The judge discounted petitioner's testimony as neither "candid" nor "credible." *Id.* at A36. Among other things, the judge noted "particularly the lack of eye contact with the [judge] when answering the questions presented to him by the [judge]." *Ibid.* The judge also emphasized petitioner's failure to include the story about the burning in effigy in his original application for asylum, concluding that "if in fact [petitioner's] fears were as precise as he indicated and if in fact this occur-

[1] "AR" refers to the certified administrative record of petitioner's deportation proceedings.

rence took place * * * this fact would not have been omitted from the original application." *Id.* at A36-A37. The judge thus concluded that the incident "did not in fact occur." *Id.* at A37. Reviewing the record in light of that determination, the judge concluded that petitioner and his family left Nicaragua "not for political reasons and not for religious reasons, but for economic reasons." *Id.* at A38. Because petitioner had failed to establish a fear of persecution, the judge denied his applications for withholding of deportation, *id.* at A39, and asylum, *id.* at A39-A43.

3. Petitioner appealed to the Board of Immigration Appeals, which dismissed the appeal after briefing. Pet. App. A25-A29. First, the Board took administrative notice "that the Sandinista party no longer controls the Nicaraguan government," explaining that effective April 25, 1990, a coalition of parties opposed to the Sandinistas had taken office following national elections in which Violeta Chamorro was elected president. *Id.* at A27. The Board also noted that President Chamorro had "announced a general amnesty covering the hostilities between the former Contra resistance and the Nicaraguan government and an end to military conscription." *Ibid.* Because petitioner's claim of persecution was based on his fears of the Sandinistas and their supporters, *id.* at A26, the Board found that the record could not support a finding that petitioner had a well-founded fear of persecution, *id.* at A27.

On April 25, 1991, petitioner filed a motion to reopen with the Board. On the next day, he filed a petition for review in the court of appeals. Pet. App. A5.

4. The court of appeals denied petitioner's petition for review. Pet. App. A1-A24.

a. First, the court considered whether it had jurisdiction over the petition for review filed by petitioner. Pet. App. A10-A15. The court questioned whether the motion

to reopen rendered the decision of the Board nonfinal and therefore not susceptible to challenge on a petition for review. See 8 U.S.C. 1105a(a) (1988 & Supp. III 1991) (petitions for review in the courts of appeals limited to "final" orders of deportation). The court noted that the courts of appeals for the Ninth and Eleventh Circuits have concluded that filing a motion to reopen deprives an order of deportation of finality, and thus precludes review by the court of appeals. Pet. App. A10-A11 (citing *Fleary* v. *INS*, 950 F.2d 711 (11th Cir. 1992); *Chu* v. *INS*, 875 F.2d 777 (9th Cir. 1989); *Hyun Joon Chung* v. *INS*, 720 F.2d 1471, 1474 (9th Cir. 1983), cert. denied, 467 U.S. 1216 (1984)). The court of appeals, however, rejected the reasoning of those courts, choosing instead to follow the Third Circuit's conclusion that jurisdiction is proper in these circumstances. Pet. App. A11-A15 (citing *Alleyne* v. *INS*, 879 F.2d 1177, 1181 (3d Cir. 1989)).

b. On the merits, the court rejected all of petitioner's claims. Pet. App. A15-A19. Of relevance to this petition, it concluded that the Board did not deprive petitioner of due process by taking official notice of the change in Nicaraguan government without giving petitioner prior notice. *Id.* at A16. The court adhered to the conclusion it reached in *Kaczmarczyk* v. *INS*, 933 F.2d 588 (7th Cir.), cert. denied, 112 S. Ct. 583 (1991), that the Board affords a litigant due process when it takes official notice if it "allows asylum petitioners an opportunity to introduce evidence rebutting officially noticed facts" by means of a motion to reopen. Pet. App. A16 (quoting *Kaczmarczyk*, 933 F.2d at 597).[2]

[2] The court of appeals consolidated petitioner's petition for review with petitions filed by Felipe Antonio Juresma-Altamirano, Luis Rodriguez-Altamirano, and Luis Andres Esquivel-Berrios. Esquivel-Berrios has filed a separate petition for a writ of certiorari, *Esquivel-Berrios* v. *INS*, No. 92-1271, to which we are filing a separate response.

5. The Board subsequently denied petitioner's motion to reopen. Pet. App. A48-A51. The Board concluded that the additional evidence introduced by petitioner was inadequate to establish that the Board erred in taking official notice of the change in the Nicaraguan government. The Board acknowledged that "the Chamorro government has not been able to curb all of the civil unrest," but stated that the evidence indicates that the government "has been able to restore, to a large extent, respect for human rights." *Id.* at A49. Moreover, the Board concluded, "the overall conditions in Nicaragua are not the issue here." *Id.* at A50. The Board explained that petitioner's alleged fear of persecution rested on the suggestion that Sandinista-led mobs were harassing Charismatic Catholics. The Board stated that petitioner's evidence "does not show any indication that such mobs are still present in Nicaragua," or that "Charismatic Catholics, or any other religion in Nicaragua, is experiencing any particularized hardships." *Id.* at A50-A51. Accordingly, the Board declined to reconsider its earlier decision. *Id.* at A51.

ARGUMENT

1. Whatever the merits of the question presented by petitioner, the case does not offer an appropriate occasion for considering that question, because the petition presents a threshold jurisdictional issue not appropriate for resolution in this case. Although the government agrees with the court of appeals' conclusion that it had jurisdiction over the petition for review, that court correctly noted that the Ninth and Eleventh Circuits have taken a contrary view. Those courts have concluded that the filing of a motion to reopen with the Board of Immigration Appeals renders the challenged decision of the Board nonfinal and thus deprives the courts of appeals of the authority to entertain a petition for review of that

decision. *Fleary* v. *INS*, 950 F.2d 711, 712-713 (11th Cir. 1992); *Hyun Joon Chung* v. *INS*, 720 F.2d 1471, 1474 (9th Cir. 1983), cert. denied, 467 U.S. 1216 (1984). That question is jurisdictional, because 8 U.S.C. 1105a(c) provides that an order of deportation "shall not be reviewed by any court" until the requisite administrative remedies have been exhausted. This Court accordingly would need to resolve that issue before reaching the merits of the question presented by petitioner.

Given the importance of the jurisdictional question, the Court may wish to address that issue in a case where the parties have adverse positions on the issue.[3] Because both parties in this case agree with the court of appeals' resolution of the jurisdictional question, this case does not offer the best opportunity to consider that question.

2. Petitioner renews his claim (Pet. 7-27) that the Board deprived him of due process by taking official notice of the change in Nicaragua's government without giving him advance notice. We disagree.

a. Petitioner does not suggest that the Due Process Clause bars courts or administrative agencies from taking official notice of facts that could not reasonably be disputed by the parties, such as a change of government

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[3] Although the parties in this case (like the parties in the Eleventh Circuit's recent contrary decision in *Fleary*, 950 F.2d at 712), both argue that a motion to reopen does not deprive the challenged order of deportation of finality, it is not unusual for an individual subject to deportation to take the opposite view. For example, an individual has an interest in supporting the opposite view if he wishes to file a single petition for review after the Board's action on the motion to reopen. See, *e.g.*, *Hyun Joon Chung* v. *INS*, 720 F.2d 1471, 1474-1475 (9th Cir. 1983) (accepting such an argument made by an individual subject to deportation). Under the Seventh Circuit's view, the time for challenging the initial order of deportation might well have expired before the Board acted on the motion to reopen, which would bar the alien from challenging the original order at that time.

in another country. His argument is limited to the contention that the Due Process Clause requires the decisionmaker to adopt procedures that give the litigant advance notice of its intention to notice the facts in question. But nothing in the Due Process Clause can support the notion that the Due Process Clause places such a tight constraint on how agencies and courts conduct their affairs. As the Seventh and D.C. Circuits have held, so long as the litigant receives a fair opportunity to rebut officially noticed facts, the Due Process Clause does not require a decisionmaker to give advance notice that it intends to notice such facts. See *Gutierrez-Rogue* v. *INS*, 954 F.2d 769, 773 (D.C. Cir. 1992); *Kaczmarczyk* v. *INS*, 933 F.2d 588, 596-597 (7th Cir.), cert. denied, 112 S. Ct. 583 (1991); cf. *Opp Cotton Mills, Inc.* v. *Administrator of Wage and Hour Division*, 312 U.S. 126, 152-153 (1941) ("The demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective.").[4]

Petitioner in this case received a fair opportunity to rebut the facts noticed by the Board in its decision. He filed a motion to reopen, submitting evidence that he contended would demonstrate that the Board's original determination was in error. The Board reviewed that evidence and concluded—on the merits—that the evidence was inadequate to establish the fear of persecution necessary for petitioner to be eligible for asylum or withholding of deportation. That decision is subject to

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[4] This Court has taken judicial notice of facts repeatedly, without any indication that it has given the parties prior notice of its intent to do so. See, *e.g.*, *Whitmore* v. *Arkansas*, 495 U.S. 149, 159 (1990); *New Jersey* v. *T.L.O.*, 469 U.S. 325, 338 (1985); *id.* at 357 (Brennan, J., concurring in part and dissenting in part); *United Steelworkers* v. *Weber*, 443 U.S. 193, 198 n.1 (1979).

review in the court of appeals under 8 U.S.C. 1105a(a) (1988 & Supp. III 1991). Accordingly, petitioner is in substantially the same position he would have been in if the Board had given him advance notice and considered his evidence at the time of its original decision. Due process requires nothing more.

b. Petitioner correctly states that the Ninth Circuit in *Castillo-Villagra* v. *INS*, 972 F.2d 1017 (1992), rejected the views of the Seventh and D.C. Circuits, and adopted a more limited view of the Board's authority in this area. *Id.* at 1029-1031.[5] In our view, however, the tension among those decisions does not warrant review in this case for several reasons. First, as noted above, the present case involves a substantial jurisdictional question that the parties did not brief in the lower court and as to which the parties would not offer an adversary presentation in this Court.

Second, whatever the merits of the view taken by the Ninth Circuit, this case does not offer a suitable occasion to consider the due process problem, because it is clear that there has been no due process violation on the facts of this case. Although petitioner argues (Pet. 13-14) that a litigant would be deprived of due process if the Board denied a motion to reopen without actually considering evidence proffered to rebut officially noticed facts, the record in this case reveals no such occurrence. On the contrary, the Board considered the evidence proffered by petitioner and found it inadequate to justify relief. Pet. App. A48-A51.[6] Petitioner also suggests (Pet.

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[5] The Sixth Circuit has taken a similar position in an unpublished decision. *Ulloa* v. *INS*, No. 91-3028 (Sept. 17, 1991), *reprinted at* Pet. App. A52-A56. Under Sixth Circuit Local Rule 24(c), that opinion has only limited precedential force. See Pet. App. A52.

[6] Petitioner also suggests (Pet. 7, 15, 19) that the procedures approved by the Seventh Circuit in this case violate the Due

19-21) that requiring him to proceed by a motion to reopen deprives him of due process by exposing him to an unreasonable risk of deportation, because a motion to reopen, unlike a petition for review, does not entitle him to an automatic stay of deportation.[7] But petitioner was not exposed to such a risk in this case, because the court of appeals withheld its mandate pending disposition of this petition for certiorari, so that petitioner was protected by a stay for the entire period until the Board disposed of his motion to reopen; at that time, petitioner again became entitled to a new stay under 8 U.S.C. 1105a(a)(3) pending disposition of his petition for review of the

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Process Clause by subjecting him to the "abuse of discretion" standard of review appropriate for motions to reopen, rather than the arguably more favorable "substantial evidence" standard appropriate for final orders of deportation. Putting to one side the obvious fact that petitioner offers no basis for concluding that the Due Process Clause entitles him to the "substantial evidence" standard of review in this context, it is not at all clear that the court of appeals will consider his challenge to the Board's denial of his motion to reopen under a standard significantly more onerous than the standard under which it considered his challenge to the original order of deportation. Although petitioner is correct in stating that the two standards are different in the abstract, he does not explain why application of the "abuse of discretion" standard would make a difference in this case. In any event, to the extent petitioner's claim rests on that problem, it is decidedly premature. The nature of the court of appeals' appellate review will be clarified when the court of appeals disposes of the petition for review of the Board's denial of petitioner's motion to reopen. Any due process claim founded on a less demanding standard of review evidenced by that decision could be considered at that time.

[7] We note that the statute also does not grant an automatic stay to an individual who files a petition for review if the individual has been convicted of an aggravated felony. 8 U.S.C. 1105a(a)(3) (1988 & Supp. III 1991).

decision of the Board denying his motion to reopen.[8] In sum, we doubt seriously that the Ninth Circuit would have found a deprivation of due process in a case like this one, where the Board's disposition of the motion to reopen has dissipated the matters of concern to the Ninth Circuit.

Third, we do not believe that the disagreement among the courts of appeals has reached the point where review by this Court is necessary. All of the courts of appeals that have considered the question agree that the Due Process Clause requires that the litigant have "an opportunity to rebut officially noticed facts." *Castillo-Villagra*, 972 F.2d at 1029 (quoting *Kaczmarczyk*, 933 F.2d at 596); *Gutierrez-Rogue*, 954 F.2d at 773 ("due process guarantees an asylum applicant the right to challenge an officially noticed fact"). The principal basis for the Ninth Circuit's unwillingness in *Castillo-Villagra* to find the motion to reopen procedures adequate was its view that it was not fair to presume, as the Seventh and D.C. Circuits have, that the Board will "exercise its discretion to stay the execution of its decision until it has had an opportunity to rule on the applicant's motion." *Castillo-Villagra*, 972 F.2d at 1030

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[8] In any event, both the Seventh and D.C. Circuits have made clear in concluding that due process permits the Board to allow rebuttal of noticed facts under motions to reopen that they "presume that when an asylum applicant uses a good faith motion to reopen to dispute officially noticed facts, the Board will exercise its discretion to stay the execution of its decision until it has had an opportunity to rule on the applicant's motion." *Gutierrez-Rogue*, 954 F.2d at 773 (quoting *Kaczmarczyk*, 933 F.2d at 597 n.9). If the Board chose not to exercise its discretion in that manner, a litigant who has filed such a motion in good faith would be entitled to judicial review in the district court by means of habeas corpus of any refusal by INS to stay deportation in the district court, see 8 U.S.C. 1105a(a)(10) (Supp. III 1991), and, in the government's view, would be entitled to a stay.

(quoting *Kaczmarczyk*, 933 F.2d at 597 n.9).[9] As discussed in note 8, *supra*, both the Seventh and the D.C. Circuits have stated that they would find it inappropriate for the Board to allow execution of an order of deportation during the pendency of such a motion. There is every reason to believe that the federal courts in those circuits would enforce that view by granting a stay if the Board did not. The practical difference between the rules of the various circuits therefore is quite minimal at this time. If subsequent developments cause a difference in the actual relief afforded to individual litigants, review then might be warranted. This petition, however, should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9] The unpublished decision of the Sixth Circuit in *Ulloa* relied heavily on the same point. Pet. App. A56 n.1.